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Regulating Short-term Rentals: A Federal Circuit Roundup

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INSIDE CANADA

By: MONICA CIRIELLO,
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Irresponsible Downspouts, Fee Awards to Losing Parties, Non-Vicious Dogs, and More.

Bonus Years: Per *Class Proceedings Act*, Plaintiff's Amended Claim is not Statute-Barred
Pinon v. Ottawa (City), 2024 ONSC 5833 https://canlii.ca/t/k7dhf
In 2019, a City of Ottawa ("City") bus driver drove a double-decker bus into the Westboro transit station killing three passengers and injuring a dozen others. The Plaintiff, a passenger on the bus, brought an action as a proposed class proceeding that same year. The proposed class proceeding, which focused on the City's systemic negligence, was denied in 2021. The Plaintiff appealed and the leave to appeal was denied in 2023. In 2024, the Plaintiff sought to amend the claim to pursue an individual claim and four new actions. The City argued that the new actions are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

HELD: Motion to amend granted.

DISCUSSION: The central issue in this case revolves around whether the Plaintiff's individual claims are based on new causes of action or stem from the facts initially pleaded in the previously proposed class action. The law is clear that if a party amends the statement of claim to add causes of action that are based on the facts not pleaded, they will be treated as new pleadings and subject to the two-year *Limitation Act*. The Court held that the limitation period under the *Class Proceedings Act,* 1992, SO 1992, c. 6 suspended the running of the Plaintiff's limitation period from 2019 until 2023 while the class certification was being pursued. Therefore, the Plaintiff's claim is not statute-barred under the *Limitations Act*. After making that determination, the Court held that despite the refusal of certification, the original claim filed by the Plaintiff contained sufficient material facts to support claims of negligence against the City, including both vicarious and direct negligence related to the bus driver and broader systemic failures including road design, bus station design, vehicle design and road repair. The Court granted the motion to allow the individual claim and four new actions.

A Property Owner's Plans goes Down the Spout
Downes & White v Calgary (City), 2024 ABLCSAB 17 https://canlii.ca/t/k7csl
The Appellants received an order from the City of Calgary ("City") under the Stormwater Bylaw and the Parks and Pathways Bylaw requiring them to remedy a downspout on Appellants' property that was directing water onto a public pathway. They appealed.

HELD: Order upheld; date of compliance extended.

DISCUSSION: A citizen complaint prompted the City to investigate, and upon inspection a municipal officer confirmed that the downspout extended beyond the Appellants' property line and discharged water onto the public pathway. The Appellants acknowledged that the downspout directed water onto the public pathway but argued this had been permitted under a 1984 encroachment agreement with the City. Furthermore, the Appellants argued that the water from the downspout caused no damage or water accumulation on the pathway.

In response, the City argued that the encroachment agreement was void, as the Appellants replaced their fence in 2020, thereby nullifying the agreement. The City relied on the Stormwater Bylaw which states that, unless approved by the Director of Water Services, downspouts may not terminate onto a Surface Drainage Facility, which includes a pathway. Furthermore, the Parks and Pathways Bylaw provides that homeowners may not redirect water from a private parcel to a pathway.

The City provided photographic evidence to demonstrate the violation of both the Stormwater Bylaw and Parks and Pathways Bylaw. The Licence and Commu-

nity Standards Appeal Board was satisfied that the City's evidence demonstrated a violation of both the Stormwater Bylaw and the Parks and Pathways Bylaw. Furthermore, the encroachment agreement, while previously in place, was voided and the Board held that the Appellants could not rely on this agreement to justify the drainage configuration.

The Board upheld the City's order requiring the Appellants to modify the downspouts to prevent drainage onto the public pathway, but allowed for additional time for the Appellants to achieve compliance.

Awarding Costs Against the Successful Party is the Price of Unjust Bans

Polischuk v. The City of Winnipeg, 2024 MBKB 156 https://canlii.ca/t/k7dhw

In 2017 the Plaintiff, a contractor with the City of Winnipeg ("City") was banned from performing any City work based on unfounded allegations that he was attempting to steal City materials. The Plaintiff was first banned from doing work on behalf of the Water Department and then ultimately received a complete ban from all City Departments. The Plaintiff filed a claim against the City claiming loss of income, based on malfeasance of public office, causing loss by unlawful means, and breach of a common-law duty of procedural fairness or natural justice. The Court found that the Plaintiff failed to establish the legal elements of his claim and dismissed the case. The City sought costs of approximately $144,000. The Plaintiff also sought costs as the losing party. The Plaintiff argued that although he did not prove legal liability, he did establish that the City's actions were neither fair nor justified. The sole issue before the Court was the proper award of costs.

HELD: Plaintiff awarded $100,000.

DISCUSSION: The Court noted the exceptional nature of awarding costs against the successful party. Relying on *Kalo v. Winnipeg (City of)*, 2019 MBCA 46, which states that the Court has broad discretion in awarding costs, even against a prevailing party, in exceptional cases. The Court considered several factors, including the City's unreasonable and unjustified bans, the City's lack of response to the Plaintiff's demand letters, and the City's refusal to acknowledge the unsubstantial nature of the allegations against the Plaintiff. The Court highlighted that while the City successfully defended against legal liability, it failed to vindicate its actions on facts. The Court found that this aligned with the principles in *Schut v. Poll Venture Investments Inc.*, [1991] O.J. No. 2425, where costs were awarded against a successful party for creating an atmosphere that had compelled the other party to litigate. The Court focused on the City's misconduct in maintaining unfounded allegations that the Plaintiff was a liar and thief, and the City's failure to respond to the Plaintiff's attempts for resolution creating the condition where the Plaintiffs only option was to sue. The Court concluded that there was sufficient justification for the costs award to the Plaintiff, viewing it as a means to address the City's misconduct and restore some semblance of justice. The Court awarded the Plaintiff costs in the amount of $100,000 for his solicitor-client costs.

Municipal Authority to Designate Vicious Dog after Bite

Nykoliuk v Calgary (City), 2024 ABLCSAB 16 https://canlii.ca/t/k7bcr

The City of Calgary ("City") designated the Appellant's dog as a Vicious Animal under the City's Responsible Pet Ownership Bylaw ("Bylaw"). The designation was made following an incident in which the dog was alleged to have bit a victim, causing injuries. The Appellant contested this particular dog's involvement, submitting that the aggressive behaviour was actually caused by another dog in her care. The Appellant also raised procedural issues, such as a lack of evidence confirming the Appellant's direct involvement and the delay in the City's designation decision.

HELD: Designation removed.

DISCUSSION: The Board evaluated whether the dog's injuries met the criteria outlined in section 51 of the Bylaw, which allows for a vicious animal designation by the City if an animal causes "severe injury" to a person or animal, or poses an ongoing public safety risk. As for severe injury, the Board determined that the City failed to substantiate that the dog's alleged bite qualified as a "severe injury" under the Bylaw, which requires serious medial intervention. The City provided no medical reports to confirm that the victim's injury met this threshold. The Board also noted that while the witness's statement mentioned a future medical procedure, the City presented no evidence to the Board to support this claim. Furthermore, the City led insufficient evidence that the dog posed a risk to health and safety. The Board was not persuaded in City's evidence that the dog was found outside of the Appellant's

Continued on page 33

Code Enforcement *cont'd from page 27*

NOTES

1. U.S. Const. amend. IV.
2. Alaska R. Crim. P. 37; Georgia Const. art. I, § 1, Para. XIII; 21 OK Stat §1266.8 (2023); Tex. Const. art. I, § 9; Tex. Code of Crim. Proc. Ch. 18.
3. Tex. Code of Crim. Proc. § 18.05.
4. Camara v. Municipal Court, 387 U.S. 523 (1967).
5. *Id.*
6. *Id.* at 530.
7. New York v. Burger, 482 U.S. 691 (1987).
8. *Id.* at 702.
9. City of Los Angeles v. Patel, 576 U.S. 409 (2015).
10. Tex. Code of Crim. Proc. § 18.05(b).
11. Tex. Code of Crim. Proc. § 18.01(c).
12. Tex. Code of Crim. Proc. § 18.05.
13. *Camara, supra* note 4, *Patel, supra* note 9.
14. Tex. Code of Crim. Proc. § 18.04(1), (2), and (3).
15. Tex. Code of Crim. Proc. § 18.04(4) and (5).
16. Tex. Code of Crim. Proc. § 18.04, 18.05, and 18.07(b).
17. Tex. Code of Crim. Proc. § 18.10; see also 18.06(a) and 18.07(a)(3).
18. Tex. Code of Crim. Proc. § 18.01(c), (d), (i), and (j).
19. Cardoso v. State, 438 S.W.3d 815 (Tex. App.—San Antonio 2014).
20. Tex. Code of Crim. Proc. § 18.10.
21. Tex. Local Gov't Code § 54.012; Tex. Local Gov't Code § 214.001; Civ. Prac. & Rem. Code §125.002.
22. Tex. Local Gov't Code § 214.001.
23. Tex. Health & Safety Code § 821.022 and 821.023.
24. Tex. Civ. Prac. & Rem. Code § 125.002(a).
25. Tex. Civ. Prac. & Rem. Code § 125.0015(a).
26. Tex. Civ. Prac. & Rem. Code § 125.002(b).
27. Tex. Health & Safety Code § 121.003.
28. Tex. Health & Safety Code § 342.008.
29. Tex. Health & Safety Code § 341.019.
30. Tex. Transp. Code Ch. 683, Abandoned Motor Vehicles, Subch. E Junked Vehicles: Public Nuisance; Abatement.

Inside Canada *cont'd from page 15*

care and control at the time of the incident, and the Board noted that a dog running at-large is an issue that is separate and apart from a designation and did not support a claim of aggressive behaviour. Lastly, the Board found the City's delay in pursuing the designation of the dog problematic, noting that there was a year-long gap between the incident and the designation decision. Based on these factors, the Board removed the vicious animal designation from the Appellant's dog, finding that neither the severity of the injury nor the demonstrated risk to public safety justified a designation under the City's Bylaw. Designation removed.

Slap on the Wrist or a Keen Demonstration of Proportionality?

Toronto (City) v. Adamson Barbecue Ltd., 2024 ONCJ 525 https://canlii.ca/t/k7br3

The Defendant was charged by the City of Toronto ("City") for operating a food service business without a licence. The Court found that the Defendant was aware of the City's licensing requirements, yet continued to operate his business despite receiving multiple warnings. The Defendant was found guilty of 17 counts of operating without a licence. This matter concerned the sentencing of the Defendant, and the City sought $1,500 per conviction, totaling $25,500.

HELD: $1,500 fine imposed on 10 counts.

DISCUSSION: The Defendant's contraventions were governed by the City of Toronto Municipal Code Chapter 545, Sections 2A (33) and 2A (34), mandating licenses for refreshment places and refreshment vehicles within the City. Penalties are set to allow for fines up to $25,000 per infraction. The City proposed a $1,500 fine per conviction, while the Defendant requested a reduced penalty without specifying an amount. The Court highlighted that sentencing for regulatory offences prioritizes deterrence, emphasizing compliance with municipal licensing to uphold public safety and health standards in business. While emphasizing the importance of public safety and deterrence, the Court also carefully considered the principles of proportionality and totality to ensure a fair and just outcome.

For proportionality, the Court must ensure that the sentence is proportionate to the offence. In this case, while there was no evidence of actual harm, the potential harm to the public from an unlicensed restaurant is significant. The Court found that the Defendant's non-compliance undermines these core protections, when it continued to operate unlicensed for over 10 months despite being aware of the violations and failing to remedy them. The Court was satisfied that the Defendant knew the responsibility and failed to obtain a licence. The principle of totality applies where a Defendant is convicted of multiple offences. In this case, the Defendant was charged and convicted of a total of 17 offences. The Court relied on *R v. Parry*, 2012 ONCA 171, finding that the total sum of all penalties should not exceed the overall gravity of the offence. The Court demonstrated a balanced approach to sentencing in regulatory offences, imposing a fine of $1,500 on 10 of the 17 convictions for a total fine of $15,000. The Court suspended the sentenced for the other counts due to the sheer number of charges laid against the Defendant. ML